OPEN SESSION
AGENDA ITEM III.A.

NOVEMBER 2017

DATE: **November 2, 2017**

TO: **Members, Regulation and Discipline Committee**
Members, Board of Trustees

FROM: **Steven Moawad, Chief Trial Counsel**

SUBJECT: **Status Report from the Office of Chief Trial Counsel (OCTC)**

EXECUTIVE SUMMARY

This report provides a status update on my orientation to the office, describes two process initiatives, and provides an update on NA/UPL and Immigration Statistics through End of September.

DISCUSSION

I. INITIAL INTERVIEWS

As previously discussed when I first arrived in the Office of Chief Trial Counsel ("OCTC"), I decided not to make any operational changes for two months. Instead, my goal was to gain a better understanding of the operations required for the members of the Office of Chief Trial Counsel to carry out their work. To that end, I conducted 48 interviews of OCTC staff including proportional representatives across both locations and all job classifications.

During these meetings, we discussed operational issues, morale, concerns about the backlog, and ways OCTC could do our jobs more efficiently. The institutional knowledge gained from these interviews led to the creation of the "expeditor experiment" and the case prioritization system project.

One thing that was abundantly clear in my conversations with people is that the investigators feel overwhelmed. Many investigators report feeling paralyzed by the high number of cases and prevented from completing investigations because they need to spend so much time updating a significant number of complaining witnesses about the status of their cases, etc. I was told that their high caseloads made it impossible to work cases efficiently. As a result, on August 4th, I announced two distinct, but related, initiatives: the "Expeditor Experiment" and the development of a Case Prioritization System.

II. EXPEDITOR EXPERIMENT

To allow investigators to spend their time working on cases that have the greatest effect on public protection, to ensure that OCTC processes the maximum number of cases, and to ensure that those matters that can be easily resolved are processed efficiently and without unnecessary consumption of resources, we chose four teams to which we assigned an "expeditor." Due to staffing levels and the limited term of the experiment, despite the desire to have expeditors be dedicated legal advisors, for the limited purposes of the Expeditor Experiment, we decided that the expeditor would take on that role in addition to their regular responsibilities. In the role of expeditor, he or she would be responsible for identifying new cases and cases in an investigator's existing caseload that could be quickly resolved, either by filing or closing, and who would work with the investigator to resolve those cases quickly.

The expeditor was tasked with proactively communicating with investigators on their team and reviewing weekly stat sheets to identify cases that fit the criteria for expedited processing (outlined below). Once identified, the expeditor would work with the investigators on their team to identify specific tasks that are necessary to determine if the case can be filed or needs to be closed.

For the purposes of this experiment, we identified the following cases that appear appropriate for expedited processing:

a. All matters wherein the expeditor, based on their experience, determines will likely close with a response from the respondent attorney.
b. All matters that the expeditor, based on their experience, believes contains insufficient information to determine whether a colorable charge exists and therefore requires further information, such as calling a complaining witness to obtain certain documents, before a trial counsel can make an informed decision about the propriety of prosecution.
c. All matters wherein a colorable charge exists but the expeditor, based on their experience, determines that the matter will likely result in non-disciplinary actions, such as the issuance of a warning letter or resource letter.
d. All matters where the expeditor, based on their experience, determines the matter is capable of resolving in 30 days. (This was not a hard deadline at which the case must return to normal processing if not resolved. Assuming the expeditor still believes the case will resolve quickly, they should continue to handle the case on an expedited basis).
e. Other matters wherein management and/or a Supervising Attorney, in their discretion, concludes the matter is appropriate for expedited treatment.

Some examples of potentially qualifying cases included: failure to communicate, failure to return the client file, bank reportables where the respondent has not responded to intake, and cases where there is no apparent need to subpoena records.

A significant factor in the ability of expeditors to facilitate the resolution of cases is that the expeditor would not only work with the investigator to identify appropriate cases and streamline the number of investigative tasks to be performed, but would also be empowered, and encouraged, to waive unnecessary processes in appropriate cases. For example, expeditors would routinely waive letters to respondents where contact by telephone is appropriate (Rule 2409) or investigative plans in cases where the investigation is straight-forward or standard (e.g., Non-Sufficient Funds in a Client Trust Account: Subpoena bank records for Client Trust Account and send a letter to the respondent requesting an explanation). In some cases, the

expeditor would be able to seek out required information rather than assigning minor tasks to the investigator.

The other keys to success would be communication and teamwork; expeditors and investigators must communicate frequently (e.g., upon receipt of any information requested, after the passage of a designated amount of time, etc.) for reevaluation of the filing decision, modification of necessary tasks, and a determination of whether the case continues to fit the expedited case criteria.

Four of the Supervising Attorneys (Melanie Lawrence and Anthony Garcia in Los Angeles and Robert Henderson and Allen Blumenthal in San Francisco) volunteered to serve as expeditors during the experiment.

The results of the experiment were difficult to quantify for several reasons. First, the development and implementation of an AS400 processing code to track cases assigned to the expeditor experiment did not occur until September 1st. Second, application of the AS400 processing code was inconsistent. Third, the Supervising Attorneys reported that the expedited treatment was beneficial in reducing case processing times, but all felt frustrated by the lack of time to devote to the project.

Despite those factors and the participation of only four of the eleven non NA/UPL enforcement teams, as of October 27th at 8:17 AM, an AS400 report on the expeditor processing code includes 103 cases. Of those 103 cases, only 34 of those cases remain open. Interestingly, the average age of the 69 Expedited cases included on the report that were closed during the experiment was 85 days.

III. CASE PRIORITIZATION SYSTEM

A. Background

Prior to March 2016, the Office of Chief Trial Counsel ("OCTC") classified complaints received in three different ways. Once an inquiry or reportable action was reviewed by an Intake deputy, it was classified as a matter to be forwarded to Enforcement, a "closer," or a "worker." Complaints were sent to Enforcement when they appeared to merit further investigation or prosecution and appeared likely to result in the imposition of discipline by the State Bar Court. Closers were complaints in which the facts do not raise viable allegations of misconduct. Worker files included: 1) complaints that contained insufficient information to ascertain whether a colorable violation existed and therefore required further information, 2) matters which would likely result in non-disciplinary actions, such as the issuance of a warning letter or resource letter, and 3) matters in which the Intake attorneys, based on their experience, determined would likely close with a response from the respondent attorney.

Prior to March 2016, the limited investigation work required on a "worker" file was performed by the Intake attorney or by Complaint Analyst IIs assigned to the Worker Team in the Intake Unit. These complaints were only forwarded to Enforcement if the worker team determined that the complaint should not be closed based on the response of the respondent, the additional information received demonstrated that a colorable violation existed, or the complaint could not be appropriately resolved with non-disciplinary actions. As the result of the transfer of the Worker Team to Enforcement, all matters that were previously deemed to be "worker" files were required to comply with the requirements of an Enforcement investigation, including the development of an investigation plan, etc. The application of the investigation standards

reserved for the Enforcement Unit to "worker" matters significantly slowed the determination of whether these matters should be closed or investigated further. Prolonging the time it takes to investigate a case increases the number of cases assigned to an investigator. High caseloads limits the investigator's ability to communicate effectively with the large number of complaining witnesses to which they are assigned.

B. Current Case Prioritization System

The current system identifies three priority levels based largely on the potential length of discipline that could result from the complaint. Complaints where 1) the attorney will potentially receive an actual suspension of at least two years, 2) the attorney's conduct in question potentially subjects the public, the courts, the administration of justice, or the legal profession to substantial harm; or 3) the attorney's conduct in question may significantly undermine the confidence of the public in the legal profession are designated as E1, or high priority, complaints. Complaints where the likely result is a stayed suspension or an actual suspension of less than two years are an E2, or middle priority, complaints. Complaints where the likely result is discipline of a public or private reproval or that may warrant an alternative to discipline are designated E3. Despite the use of "priority codes," the only real difference in the way that cases are handled is that an E1 case would not be assigned to a Deputy Trial Counsel without a Senior Trial Counsel being assigned as co-counsel. This means that the same process is applied to complaints in different priority codes. Further, the system does not prioritize, in any practical way, the investigation of one complaint over another. The lack of clear processing rules to prioritize higher level complaints, combined with the heightened focus on the number of complaints in backlog means that complaints in backlog, or those in danger of falling into backlog, are always worked first, regardless of priority.

C. Draft Case Prioritization System

As a result, we set out to create a case prioritization system that is centered on public protection. To me, that meant two things: 1) prioritizing those complaints which put the clients, or the general public, at the most significant risk, and 2) addressing as many complaints of misconduct as quickly, completely, and capably as possible.

We opted to define the criteria for the priority levels based largely on the underlying conduct rather than the potential length of discipline. We did this for several reasons. First, there are some allegations of misconduct that can cause significant harm to the client but the presumed length of discipline provided in the Standards for Attorney Sanctions for Professional Misconduct does not include an actual suspension of at least two years. Second, there are some allegations of misconduct that, while the presumed length of discipline does not include an actual suspension of at least two years, the misconduct will cause future harm that could be avoided or mitigated by State Bar action. Finally, while this may also be true of some conduct-based criteria, the length of discipline may be difficult to predict at intake, prior to any real investigation.

The proposed case prioritization system, Attachment A, is guided by a few touchstones. First, we have to acknowledge that by placing priority on one thing we necessarily reduce the priority of another. For example, if a priority system is not based entirely on the age of a complaint, the emphasis on minimizing the number of complaints in backlog is necessarily reduced. Second, we cannot effectively prioritize 75% of our complaints. As a result, we have attempted to select attorney misconduct that would classify five to ten percent of our caseload for priority (P1) treatment. Of course, the criteria used to identify the different priority levels will be reevaluated on a regular basis to ensure the system continues to operate efficiently. Third, the system must

be flexible enough to address trends in attorney misconduct and capable of quick revision as operational needs require. Fourth, we have also tried, to the extent possible, to identify prioritization criteria in a way that different people would classify a given case in the same manner. Finally, in general, a high priority complaint should have the highest level of formality and be investigated to a greater extent than a lower priority complaint. Conversely, the same resources that are expended on a high priority complaint generally should not be expended on a low priority complaint. Therefore, the case prioritization system relies on the implementation of expeditors to achieve process improvements for lower priority complaints with an eye towards a reduction in caseload.

D. Expedited Category Explained

Based on lessons learned from the Expeditor Experiment, the Expedited category, currently P3, consists either of complaints that previously fell into the "worker" file category, complaints that are potentially subject to a rapid determination of whether they can be filed or closed, and complaints that require immediate attention but do not rise to the same level of risk to public protection to which complaints in the Priority One category rise. The intent of the expedited priority code, and the case prioritization system overall, is to eliminate unnecessary process, not to reduce the quality of work. As a result, a key focus of the case prioritization system is to ensure the active involvement of attorneys in the complaints as early as possible.

As during the Expeditor Experiment, the "expeditor" will proactively communicate with investigators on his or her team, review weekly stat sheets to identify complaints that fit the criteria for expedited processing, and work with the investigators on his or her team to identify specific tasks that are necessary to determine if the complaint can be filed or needs to be closed. The expeditor will also be empowered, and encouraged, to waive unnecessary processes where appropriate. However, unlike the Expeditor Experiment, the plan is to have the expeditors be 100% dedicated to the identification of Expedited cases and to working with the investigator to resolve those complaints quickly.

Of course, the selection of the expeditor is important. An expeditor must have a significant amount of trial experience and solid judgement so they can correctly and quickly identify both the issues that should prevent a complaint from being filed and those gaps in evidence that need to be resolved so the complaint can be filed. Expeditors should be proactive, decisive, familiar with our internal processes, and be comfortable waiving unnecessary aspects of an investigation.

Expeditors and investigators will be expected to communicate frequently to determine what tasks remain necessary in order to make the filing decision and to determine whether the complaint continues to fit the expedited criteria. The expeditor and investigator must work together to ensure that the only tasks performed during an investigation are those necessary for deciding whether the complaint can be filed and, if the complaint is to be filed, to get it ready for filing.

The benefit of expedited processing for these complaints is that it allows us to dedicate resources to complaints that involve the greatest threat to the public and work to remove any and all unnecessary tasks on those complaints that do not represent a significant threat to the public. The change in process pursuant to the priority code also allows us to reallocate resources to their highest and best use. For example, investigators currently spend a significant amount of time drafting closing letters. While having investigators draft closing letters may be appropriate for expedited complaints, it may be more appropriate to have deputy trial counsel draft the closing letter if a higher priority complaint is closed. Reassigning this task from the

investigator to the attorney will allow the investigator to devote that time to the investigation of other complaints.

E. Potential Changes

This draft is still "in-progress" and is subject to change. I have sought, and will continue to seek input from various stakeholders. Even after the system is "finalized" and put into place, as mentioned above, it is important that the regularly reevaluated to accommodate changing trends in attorney misconduct and operational efficiency. One of the things that we are considering is adding a separate category for Moral Character and Reinstatement cases. Those cases have distinct timelines and are susceptible to disparate treatment.

While we opted to keep the system as simple and streamlined as possible at the outset, in the future, we may opt to separate the current P2 "Standard" category into two or more separate categories. Of course, if the process changes applicable to P2 complaints provide both flexibility and sufficient guidelines, multiple categories may not be required.

We will likely continue to wordsmith the "All matters wherein the respondent has three or more current complaints or a current complaint and a history that five or more complaints within the past two years involving similar allegations, but those complaints do not rise to the level of the Priority One category" criterion. This criterion is meant to address a situation where despite the fact that there are multiple complaints that do not fit into the Priority One category, the sheer number of complaints, including reports of performance issues (e.g., communication, failure to appear in court, failure to file documents) and Reportable Actions (e.g., bounced checks in a Client Trust Account, etc.) lead us to believe that the case needs to be looked into quickly either because there may be something more serious going on or because an investigation may prevent future harm from occurring. The intent here is to expedite the investigation to determine whether or not the matter belongs in Priority One.

F. Impact of Prioritization on the Backlog

The number of complaints in backlog is one indicator of the health of the attorney discipline system. It is an important statistic and is one indication of case processing effectiveness. However, the backlog number alone does not present a complete picture of the health of the attorney discipline system. Further, the historical scrutiny of the number of complaints in backlog has led to a culture of trying to minimize the backlog at all costs. Thus, the complaints in backlog receive the most attention whether those complaints represent the most significant risk to the public or not.

If minimizing or eliminating the backlog is the primary mission, a very simple case prioritization system would be effective: Always work the oldest case first. However, given that our statutory mission is public protection, our case prioritization system must prioritize cases that cause greater harm to the public.

Because the case prioritization system is designed to prioritize cases that cause greater harm to the public and to reduce caseloads through process improvements, the case prioritization system is not a backlog reduction tool. However, the case prioritization system may result in a reduction in backlog, both through resolution of backlogged complaints that meet the criteria for expedited treatment and through freeing up investigator resources to work on other complaints. Regardless, the prioritization of cases based on the harm to the public is a valuable outcome that justifies such a system even if the case prioritization system does not directly impact the backlog.

IV. NA/UPL AND IMMIGRATION ISSUES

Over the last month, the State Bar has had several opportunities to interact with the Legislature. Both the unauthorized practice of law and the treatment of immigrants by both attorneys and non-attorneys, whether clients in immigration cases or in general, remain very important to the Legislature.

These interactions allowed us to provide the Legislature with some of the statistics, Attachment B, related to NA/UPL and immigration. These statistics show that we have received 493 NA/UPL inquiries from January 1 through September 29. Approximately 111 of those, or 23%, are immigration related. While not reflected on Attachment B, 279of the 493 inquiries were forwarded to investigations. Of those 279, 50 were immigration matters.

From January 1 through September 29, we made 241 Law Enforcement Referrals on NA/UPL cases. There were approximately 52 cases in which we have not yet made a Law Enforcement Referral. Of those, 29 are still open and will likely receive a law enforcement referral and 6 other matters were not referred to law enforcement either because we received the case from law enforcement or because the CW made the referral themselves

Recently, members of OCTC worked to shut down a fake law firm that victimized more than 4,000 vulnerable immigrants. These victims had paid for legal advice on immigration issues, but the operator was not a licensed attorney. The OCTC team assumed the practice pursuant to Business and Professions Code section 6126.3. Our office has begun to work with various consumer protection and legal aid agencies to return files to the victims and ensure that they get the assistance that they need.

In addition to the substantive case-related NA/UPL and immigration issues, I have been working with the Assistant United States Attorney for the Eastern District to develop a protocol to more effectively address the Unauthorized Practice of Law. We have also reached out to detention centers in an effort to conduct UPL training for those being detained. This is particularly important in those detention centers that do not have Legal Orientation Programs to educate detained immigrants about their rights and the immigration court process. We have demonstrated a commitment to addressing immigration issues through several recent hires, including several attorneys with immigration experience and one that recently completed a two-year fellowship at the University of California's Immigrant Legal Services Center.

STRATEGIC PLAN GOALS & OBJECTIVES 2017-2022

Goal: 1. Successfully transition to the "new State Bar"— an agency focused on public protection, regulating the legal profession, and promoting access to justice.

Objective: c. Implement and pursue governance, composition, and operations reforms needed to ensure that the Board's structure and processes optimally align with the State Bar's public protection mission.

ATTACHMENT(S) LIST

A. DRAFT – Case Prioritization System – 2017 – 10 - 27

B. NA/UPL and Immigration Statistics through End of September

Attachment A

Priority	Criteria
Priority One P1	Except for criterion 10, regarding the unauthorized practice of law, below, we will not designate a case Priority One unless the respondent is on active status or will be able to return to active status in the near future. **Significant, Ongoing, or Serious Potential Harm to the Public** 1. Respondent has prior discipline that includes an actual suspension and the current alleged misconduct has caused either significant or continuing harm, or the misconduct will cause future harm that could be mitigated by immediate action. 2. Respondent has been disbarred, has been reinstated, and has committed new misconduct, unless the current alleged misconduct is insignificant. 3. Respondent has: a) intentionally misappropriated funds, regardless of the amount, b) misappropriated $25,000 or more, or c) misappropriated funds and has not paid restitution. This criterion does not include mishandling through mere inadvertence (i.e., conduct that does not demonstrate intentional or grossly negligent appropriation). 4. Respondent has committed misconduct against (a) vulnerable victim(s), including but not limited to aged, incapacitated, infirm, disabled, incarcerated, or immigrants, and the misconduct has affected the outcome of the matter (e.g., loss of rights or remedies), resulted in serious harm, or was committed three or more times. For clients in immigration matters and the incarcerated, this criterion will not be met unless there is an allegation other than ineffective assistance of counsel (i.e., there must be, at a minimum, a credible allegation that the attorney abandoned the client, failed to communicate, failed to appear, etc.). 5. Respondent has entered into a business transaction with a client or acquired a pecuniary interest that is adverse to the client, and the client was significantly harmed (e.g., money, equity, or rights belonging to the client improperly came under and remain under the control of the respondent, the conflict has led to the abandonment of the client or a failure to abide by the client's lawful direction, etc.). **Abandonment** 6. Respondent has abandoned three or more unrelated clients and either: a) is not cooperating with State Bar investigations, b) has not refunded unearned fees, or c) has not returned a client file. 7. Respondent has failed to return a client file following a request from the State Bar to return the file. 8. Respondent has abandoned his or her law practice. **Abusive and/or Frivolous Litigants** 9. Respondent has been judicially sanctioned for engaging in abusive or frivolous litigation and either: (a) respondent has engaged in a pattern of misconduct or (b) respondent is continuing to engage in abusive or frivolous litigation. **Unauthorized Practice of Law** 10. Respondent has engaged in the unauthorized practice of law and either: (a) has caused harm to two or more unrelated victims or (b) has not returned unearned fees to two or more unrelated victims. 11. Respondent has allowed non-lawyers to operate his or her law office, settle cases, operate a trust account, solicit clients, and/or provide legal advice or services to clients; and harm to clients has resulted. **Management Discretion** 12. Other cases wherein management/staff, in its discretion, concludes that respondent has caused serious harm; concludes that respondent has engaged in intentional ethical violations; or otherwise concludes the matter is appropriate for Priority One treatment.

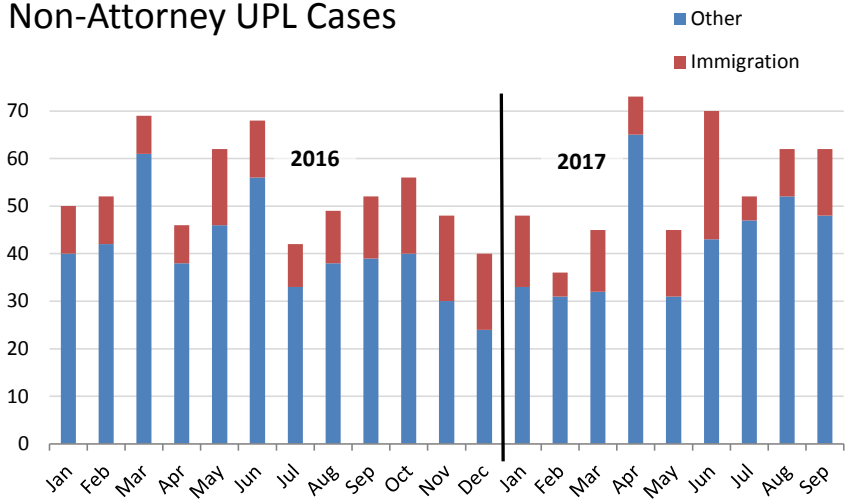
Standard P2	All matters that do not fall into a different priority code
Expedited P3	Matters included: 1. All matters wherein an Expeditor, based on his or her experience, determines will likely close with a response from the respondent attorney. 2. All files that an Expeditor, based on his or her experience, believes contain insufficient information to determine whether a colorable charge exists and therefore requires further work, such as calling a complaining witness to obtain certain documents, before a trial counsel can make an informed decision about the need for further investigation. 3. All matters wherein a colorable charge exists but an Expeditor, based on his or her experience, determines that the matter will likely result in non-disciplinary actions, such as the issuance of warning letters or resource letters. 4. All non-Priority One matters where an Expeditor, based on his or her experience, determines that the matter can be resolved within 60 days. 5. All matters wherein the respondent has three or more current complaints or a current complaint and a history that five or more complaints within the past two years involving similar allegations, but those complaints do not rise to the level of the Priority One category. 6. Other matters that management and/or a Supervising Attorney, in their discretion, conclude are appropriate for expedited treatment.

Attachment B

Non-Attorney Unauthorized Practice of Law (UPL) Cases Filed w OCTC

		Immigration (IMM)	Other	Total
2016	Jan	10	40	50
	Feb	10	42	52
	Mar	8	61	69
	Apr	8	38	46
	May	16	46	62
	Jun	12	56	68
	Jul	9	33	42
	Aug	11	38	49
	Sep	13	39	52
	Oct	16	40	56
	Nov	18	30	48
	Dec	16	24	40
2017	Jan	15	33	48
	Feb	5	31	36
	Mar	13	32	45
	Apr	8	65	73
	May	14	31	45
	Jun	27	43	70
	Jul	5	47	52
	Aug	10	52	62
	Sep	14	48	62

Non-Attorney UPL Cases



	Non Attorney - UPL			
Annual Totals	Total	Other	IMM (n)	IMM (%)
2016	634	487	147	23%
2017 (YTD)	493	382	111	23%
2017 (Projected Year-End)	657	509	148	23%

Annual Totals	Law Enforcement Referrals Non-Attorney UPL
2016	453
2017 (YTD)	241
2017 (Projected Year-End)	321

- *For 2017, through the end of September, OCTC has received 493 complaints regarding non-attorneys.*
- *Projecting to year-end, OCTC is on pace to receive 657 complaints regarding non-attorneys, a slight increase over the 634 complaints received in 2016.*
- *Immigration related complaints regarding non-attorneys have been about one quarter (23 percent) of the total non-attorney complaints.*
- *For 2017, through the end of September, OCTC has received 111 complaints regarding non-attorneys that are related to immigration matters.*
- *Projecting to year-end, OCTC expects to receive just under 150 immigration related complaints regarding non-attorneys.*
- *For 2017, through the end of September, OCTC has referred 241 Non-Attorney UPL cases to law enforcement.*
- *Projecting to year-end, OCTC is on pace to refer 321 Non-Attorney UPL cases to law enforcement.*

Attachment B

Immigration Related Complaints (Attorney & Non-Attorney)

		Atty	Non-Atty	Total
2016	Jan	50	10	60
	Feb	53	10	63
	Mar	58	8	66
	Apr	37	8	45
	May	40	16	56
	Jun	45	12	57
	Jul	45	9	54
	Aug	44	11	55
	Sep	34	13	47
	Oct	35	16	51
	Nov	31	18	49
	Dec	28	16	44
2017	Jan	37	15	52
	Feb	27	5	32
	Mar	36	13	49
	Apr	51	8	59
	May	43	13	56
	Jun	58	27	85
	Jul	49	5	54
	Aug	33	10	43
	Sep	18	14	32

San Diego Immigration Related Complaints (Attorney & Non-Attorney)

		Atty	Non-Atty	Total
2016	Jan	2	0	2
	Feb	2	1	3
	Mar	2	1	3
	Apr	4	1	5
	May	4	1	5
	Jun	1	0	1
	Jul	3	0	3
	Aug	4	0	4
	Sep	3	2	5
	Oct	1	0	1
	Nov	1	0	1
	Dec	7	0	7
2017	Jan	5	1	6
	Feb	4	1	5
	Mar	0	0	0
	Apr	4	1	5
	May	1	0	1
	Jun	2	1	3
	Jul	5	0	5
	Aug	2	0	2
	Sep	2	0	2

Statewide

Annual	Atty	Non-Atty	Total
2016	500	147	647
2017 (YTD)	352	110	462
2017 (Projected Year-End)	469	147	616

San Diego County

Annual Totals	Atty	Non-Atty	Total
2016	34	6	40
2017 (YTD)	25	4	29
2017 (Projected Year-End)	33	5	39